

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS**

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
EURO MOTORCARS, INC**

Petitioner

Paul J. DiPiazza

Jim Voelzke

James Hendricks

Edward Papazian

For the Petition

C. Robert Dalrymple, Esquire

Erin E. Girard, Esquire

Attorneys for the Petitioner

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Board of Appeals Case No. S-2774
OZAH Case No. 10-27

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2774, filed on May 19, 2010, seeks a special exception, pursuant to §G-1.2.1 of the Zoning Ordinance, to permit an “Indoor/Outdoor automobile sales” business within an existing shopping center at 7008 Wisconsin Avenue, Bethesda, Maryland, on land in the CBD-1 Zone.

Exhibit 1(a). The property’s legal description is Lot 7, Block 2 of the George P. Sacks’ Subdivision. The operation would be a relocation of Petitioner’s business from two existing locations in Bethesda.

On June 9, 2010, the Board of Appeals issued a notice of hearing scheduling this matter for a hearing before the Office of Zoning and Administrative Hearings on November 2, 2010. Exhibit 14. Technical Staff of the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report issued October 25, 2010, recommended approval of the special exception, with conditions. Exhibit 15.¹ Technical Staff did not send the matter to the Planning Board for its review, but did supplement its memorandum by e-mail on November 2, 2010 (Exhibit 17), in response to questions posed by the Hearing Examiner to Petitioner in advance of the hearing (Exhibit 16).

There has been no input from the community in this case.

A public hearing was convened as scheduled on November 2, 2010. Petitioner, Euro Motorcars, Inc., called four witnesses, and there were no other witnesses at the hearing.

The record was held open until November 9, 2010, on which date Petitioner submitted a statement as to the current zoning of its existing business locations in Bethesda and signage requirements at the new location (Exhibit 20). The record closed, as scheduled, on November 9, 2010.

This case is a bit unusual because there are no specific requirements that govern the special exception sought by Petitioner. The specific conditions for special exceptions are usually spelled out in Division 59-G-2 of the Zoning Ordinance; however, this particular special exception has no corresponding provision in Division 59-G-2, and therefore has no specific standards. Nevertheless,

¹ The Technical Staff report is frequently quoted and paraphrased herein.

“Automobile sales, indoors and outdoors” is a use permitted as a special exception (for sites developed under the standard method of development),² in Zoning Ordinance §59-C-6.22(d), which sets forth the uses permitted in the CBD-1 Zone.

There is only one substantial issue in this case – whether Petitioner is required to make a showing of “neighborhood need,” and if so, did it meet that requirement. For the reasons discussed in Part IV. E. of this report, the Hearing Examiner finds that no such showing was required in this case and that Petitioner has satisfied all the applicable requirements for the special exception it seeks. The Hearing Examiner therefore recommends that it be granted, subject to the conditions set forth in Part V of this report.

II. FACTUAL BACKGROUND

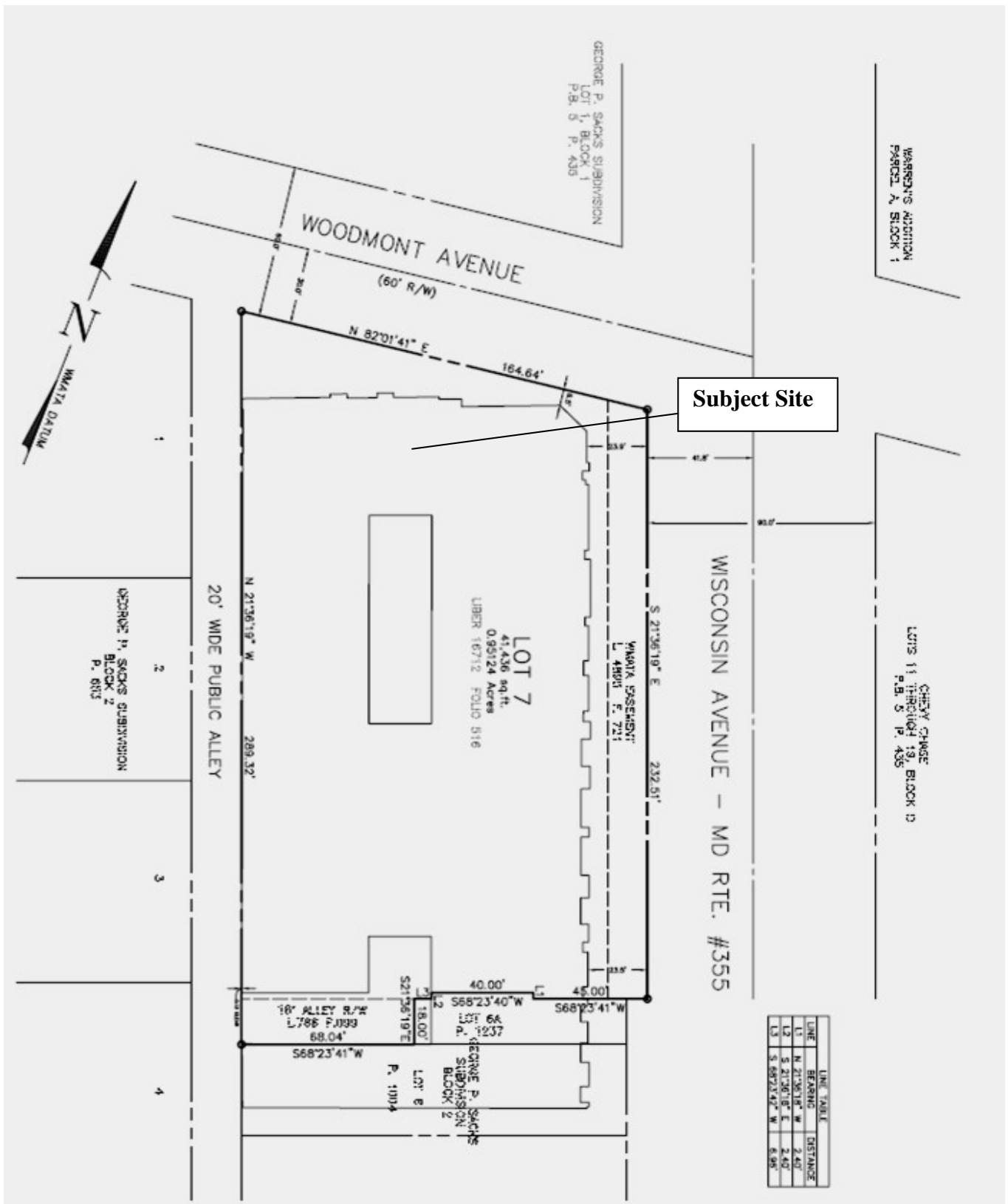
A. The Subject Property and the Neighborhood

Technical Staff reports that the entire subject property is comprised of one recorded lot, known as lot 7, block B of the George P. Sacks’ Subdivision, totaling 41,436 square feet (0.95 acres). Exhibit 15, pp. 2-4. The property, which is owned by Wisconsin & Woodmont, LLC, is located on the southwest corner of the intersection of Woodmont Avenue and Wisconsin Avenue in downtown Bethesda, and is approximately a quarter-mile south of the Bethesda Metro Station. An existing shopping center sits on the CBD-1 zoned property, which includes 8,023 square feet of vacant commercial space that is the subject of this special exception application.

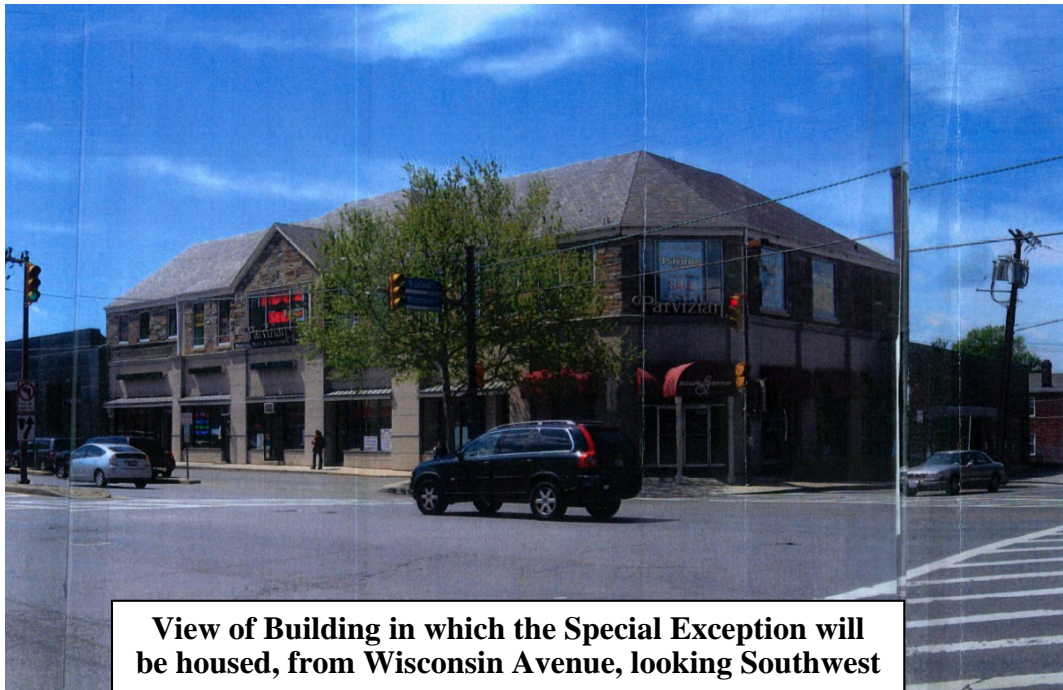
The property is fully developed with a commercial shopping center constructed in the early 1930s. Technical Staff describes it as having “more of a pedestrian orientation and streetscape than most recent shopping centers, with the building oriented close to Woodmont and Wisconsin Avenues.” Exhibit 15, p. 3. Sixteen parking spaces are available for the shopping center, with eight standard spaces located along Woodmont Avenue and eight parallel spaces along Wisconsin Avenue.

² Zoning Ordinance §59-C-6.22(d) permits the use as a matter of right in the CBD-1 Zone for sites developed under the optional method of development.

The location of the subject site is shown on the Identification Plat (Exhibit 4(c)):



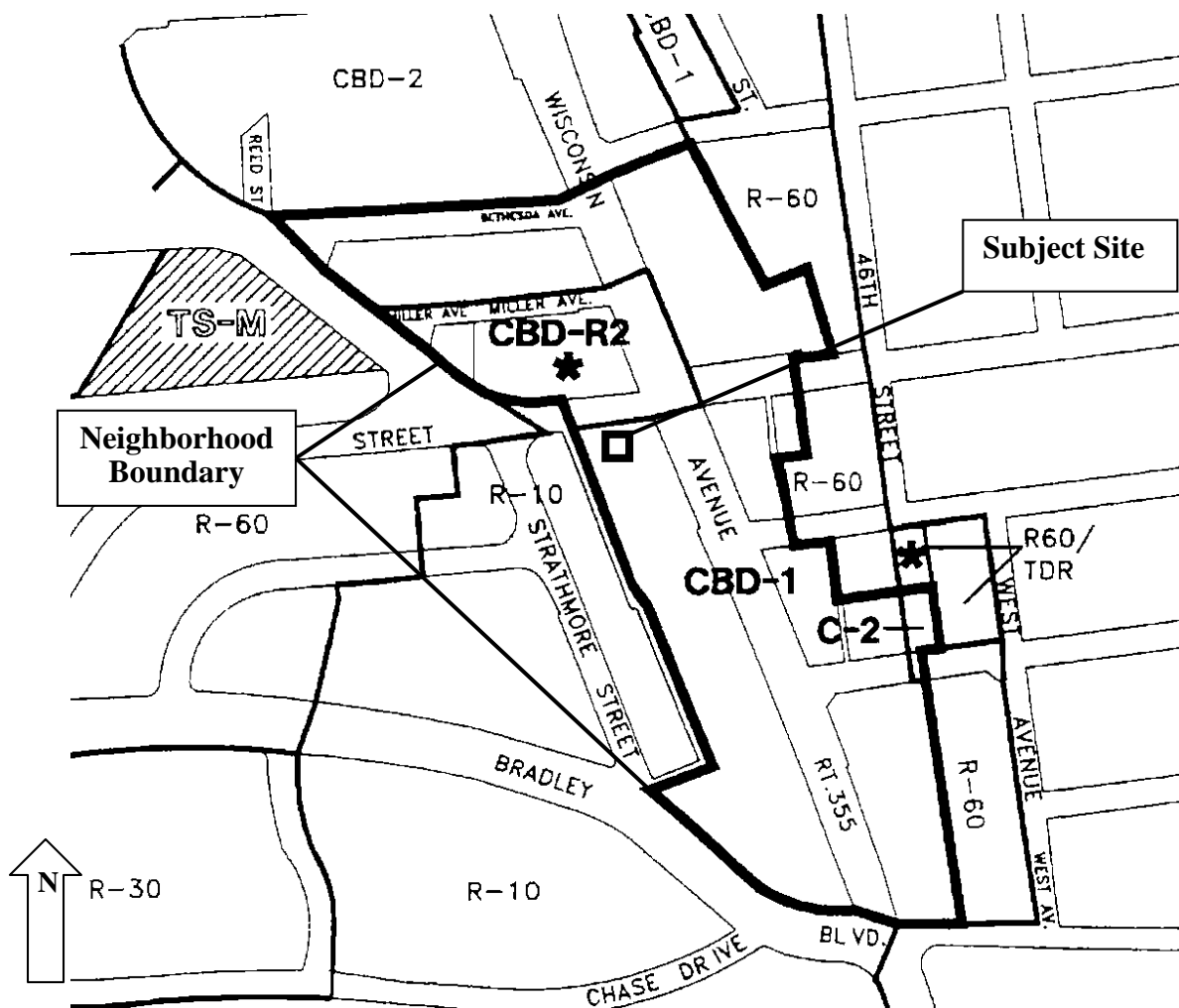
The subject property is depicted below in two photos from the Technical Staff report (Exhibit 15, pp. 5-6). The top photograph shows the existing building as seen from Wisconsin Avenue, and the bottom photograph shows the building along Woodmont Avenue.



Technical Staff describes the existing use as follows (Exhibit 15, p. 4):

The shopping center consists of many retail uses, such as an Oriental rug store, a small restaurant, a kitchen/bath showroom, a drycleaners, an apparel store, a FedEx operation, and an art gallery. The 8,023 square foot space proposed for the special exception was previously a contemporary furniture showroom but has sat vacant for the past two years. Interestingly enough, the same space was formerly used as an automobile sales center for Ford vehicles in its early history. . . .

The neighborhood is depicted on a map provided by Technical Staff (Exhibit 15, p. 7):



The site is located in the Wisconsin South Corridor of the downtown Bethesda neighborhood. Staff defines the neighborhood as bound by Bethesda Avenue to the north, the mid-block section of Wisconsin Avenue to the east, Bradley Boulevard to the south, and Woodmont Avenue and Strathmore Street to the west. Exhibit 15, p. 6. The Hearing Examiner accepts that definition.

Staff notes that building heights and uses in the neighborhood are very diverse, with the majority of buildings being of low to moderate height and containing predominantly office and retail/commercial uses. The entire neighborhood is zoned CBD-1, with three small outlying areas being zoned CBD-R2, C-2, and R-10 respectively. No other automobile dealerships exist within the South Wisconsin Corridor neighborhood.

B. The Proposed Use and its Impacts

1. The Proposed Facility and Operations:

Paul J. DiPiazza, the president of Petitioner, Euro Motorcars, testified concerning Petitioner's operations and plans. Tr. 19-26; 48-51. He stated that Petitioner is the contract lessee of a portion of the subject property, and that its intention, if the special exception is granted, is to use half of the leased area as a Rolls-Royce showroom and the other half as a Bentley showroom. Tr. 19. A redacted copy of the lease is in the record as Exhibit 9. It indicates that the property is owned by Wisconsin & Woodmont, LLC, and it is managed by Washington Property Company, LLC.

Petitioner currently operates a Rolls-Royce dealership and a Bentley dealership, which are located in separate facilities on Bethesda Avenue in Bethesda, although they are jointly managed. Petitioner is the exclusive dealer in this region. The Rolls-Royce store is located at 4919 Bethesda Avenue, and it has a 2,500 square foot showroom. Just down the block, at 4937 Bethesda Avenue, Petitioner has a Bentley showroom of approximately the same size. They are permitted uses, without special exception, in the C-2 Zone, where they are currently located. Exhibit 20.

Because officials of Rolls Royce have informed Petitioner that its space is inadequate for a Rolls Royce showroom, Petitioner seeks to move sales operations to the new location at the subject site. The move will expand the combined sales area from about 5,000 square feet to 8,023 square feet, which will satisfy Rolls Royce, and allow Petitioner to combine its two dealerships in one location. The staffing and hours, as described below, will remain the same at the new location:

Petitioner operates those franchises in tandem, so they have a single general manager and a joint sales force that consists of about anywhere from seven to 10 people, depending on what the staffing levels are at any time, and they serve both customer groups. Petitioner is open Monday through Saturday, 10:00 a.m. to 6:00 p.m., and Sundays typically only by appointment. It is a very low volume kind of a business. Typical clientele at the dealerships are high-end luxury car buyers, at an average of 5 customers per day. Approximately 3 test drives a day would be expected from the site. Petitioner typically sells on average about 10 cars a month out of the combined locations. Thirty to forty percent of the cars will actually be picked up at those locations, but a lot of the sales are made nationally, and the cars never actually are delivered from the retail location. They are shipped from a vehicle service center.

Service takes place on Marinelli Road in Rockville, where Petitioner has a facility. New cars, as they come into Petitioner's inventory, are delivered at Marinelli Road. They go through a pre-delivery inspection, where they get ready to be delivered to the customers. That takes place on Marinelli Road. All customers who have service needs go to Marinelli. Petitioner has a service advisor there and performs no automobile servicing in Bethesda.

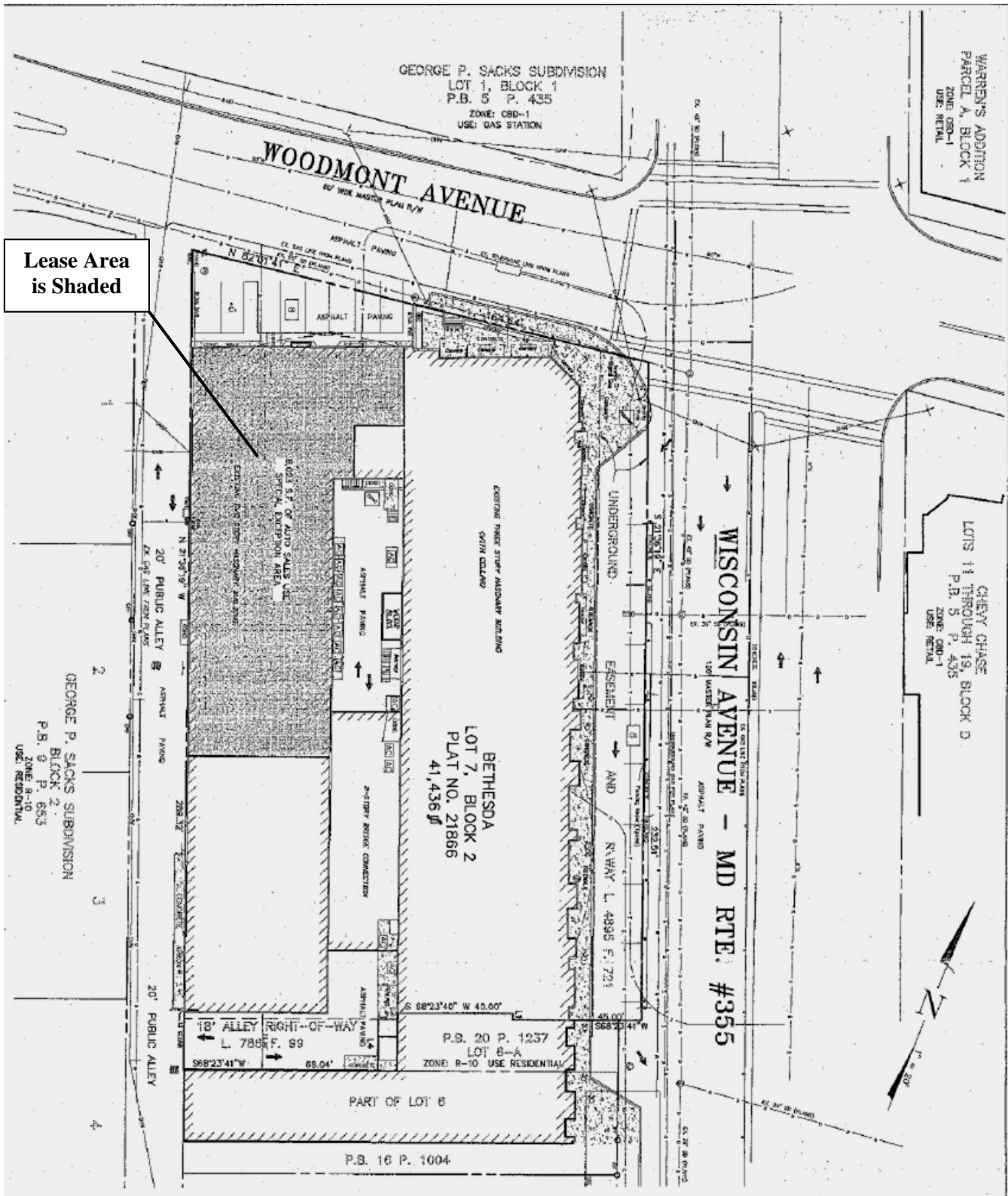
The Statement of Petitioner (Exhibit 3, p. 3) describes the proposed use of the new facility:

It is anticipated that the dealerships will house approximately 10 cars inside two distinct showrooms (5 Bentleys and 5 Rolls-Royce), as shown on the floor plan [Exhibit 4(d)] The dealerships also intend to display approximately 4 cars (2 Bentleys and 2 Rolls-Royce) outside, within the 8 parking spaces between the building face and Woodmont Avenue, as shown on the Special Exception Site Plan, attached as [Exhibit 4(a)] The remaining 4 spaces would be used for visitor parking and employees would park off-site.³ Cars would enter the dealership for display via the front doors, and would be individually driven to the site. No car carriers would be used for car delivery.

2. The Site Plan, Floor Plan and Elevations:

The Site Plan (Exhibit 4(a)), the Floor Plan (Exhibit 4(b), top) and the Exterior Elevations (Exhibit 4(b), bottom) are reproduced on the following pages.

³ Because the Property lies within the Bethesda Parking Lot District, the Property owner pays a tax in lieu of providing all required parking on-site.



GENERAL NOTES

1. The topography is from a field run survey prepared by MHG, PA, supplemented with available utility records.
2. The boundary is from deeds and plats of record.
3. The site is located within the Bethesda CBD Sector Plan area of the Bethesda Chevy Chase and Vicinity Planning Area.
4. The site is located within the Bethesda/Chevy Chase Transportation Policy Area.
5. The planimetric information shown outside of the site boundary is from M-NCP&PC GIS data.
6. The property does not contain any wetlands, streams, or floodplains.
7. The property is located within the Little Falls Watershed, a Class I watershed.
8. The property is subject to an approved Preliminary Plan #1-01007.
9. The property is subject to an approved NRI/FSD #4-000326E.
10. The property does not contain any forest, or specimen trees.
11. The property is in the WSSC water category W-1 and sewer category S-1.
12. The horizontal datum is in the Maryland (NAD83/81) coordinate system.
13. This application is for a change in use to one requiring a special exception and does not propose any exterior site construction.
14. An existing Declaration of Covenant recorded in Liber 18999, Folio 017 provides for future right-of-way dedication, public improvements and other site improvements when the subject property is redeveloped.

SITE DATA

SUBJECT PROPERTY: LOT 7, BLOCK 2
GEORGE P. SACKS' SUBDIVISION
PLAT #21986

LOT AREA: 41,436 S.F. 0.95124 AC.

ZONING CLASSIFICATION: CBD-1

PROPERTY ADDRESS: 7008 WISCONSIN AVENUE, BETHESDA, MD

EXISTING USES: RETAIL 28,725 S.F.

PROPOSED USE: AUTOMOBILE SALES 8,023 S.F.

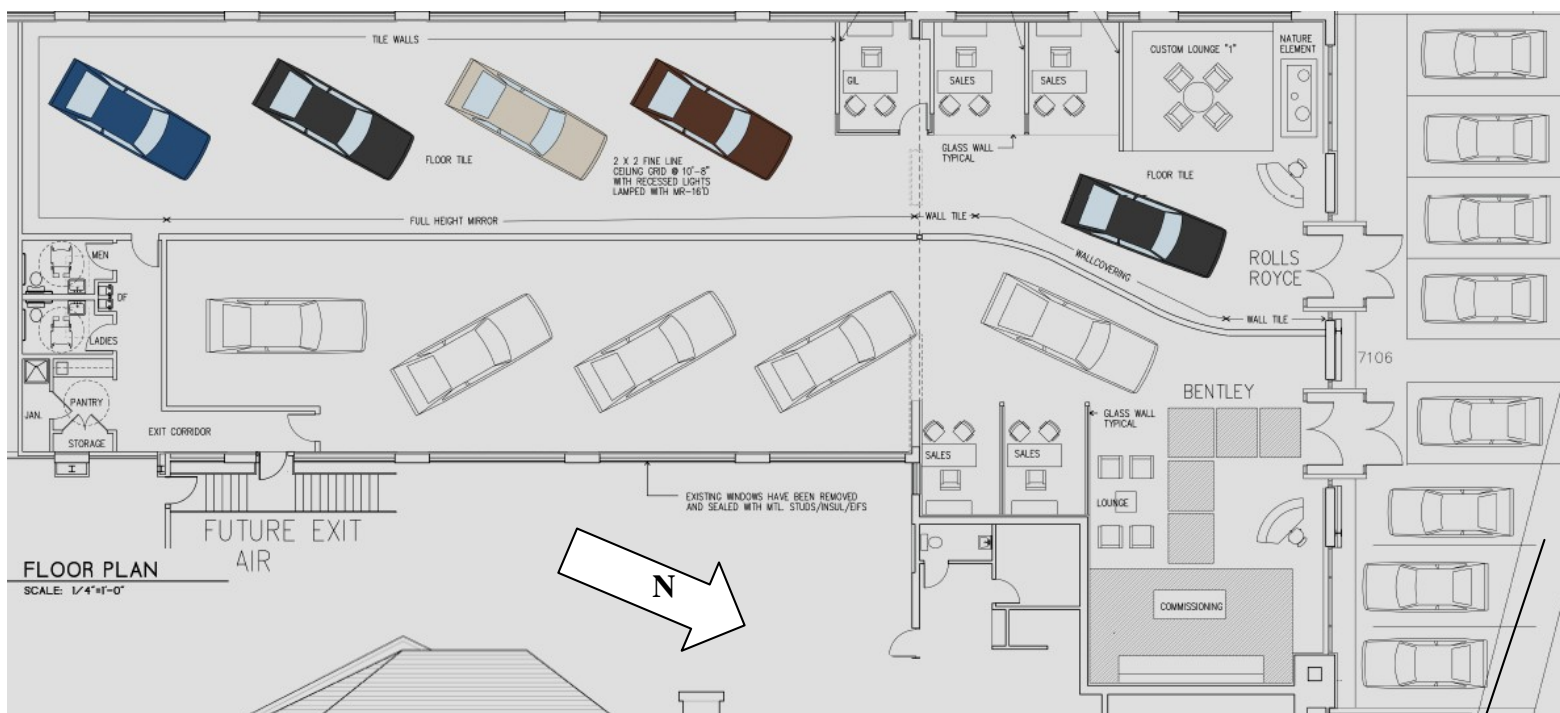
PREVIOUS APPROVALS: PRELIMINARY PLAN 1-01007
NRI 4-000326E

DEVELOPMENT STANDARDS

	(REQUIRED)	ALLOWED	(EXISTING)	PROPOSED
TRACT AREA (59-C-6.231)	N/A		41,436 S.F. 0.95124 AC.	
BUILDING COVERAGE (59-C-6.323)	75% LOT AREA = 31,077 S.F.		65% 27,045 S.F.	
PUBLIC USE SPACE (59-C-6.233)	10% LOT AREA 4,144 S.F.		0.06% 2,587 S.F.	
BUILDING AREA (59-C-6.234(a))				
EXISTING BUILDING	1.0 FAR = 41,436 S.F.		0.69 FAR = 36,748 S.F.	
BUILDING HEIGHT (59-C-6.235(a))	60'		28.2'	
BUILDING SETBACKS				
PUBLIC ROW (59-C-6.236(b)(2))	1/6" > 30' = (28.2/6 = 4.7')		6.5'	
SIDE SOUTH LOT (59-C-6.236(b)(3))	0'		0'	
PARKING (59-E-3.7)				
GENERAL RETAIL (27,577 S.F.)	5/1,000 S.F. = 138		18	
AUTOMOBILE SALES (8,023 S.F.)	5/1,000 S.F. = 40			
TOTAL	178 SPACES		16 ²	

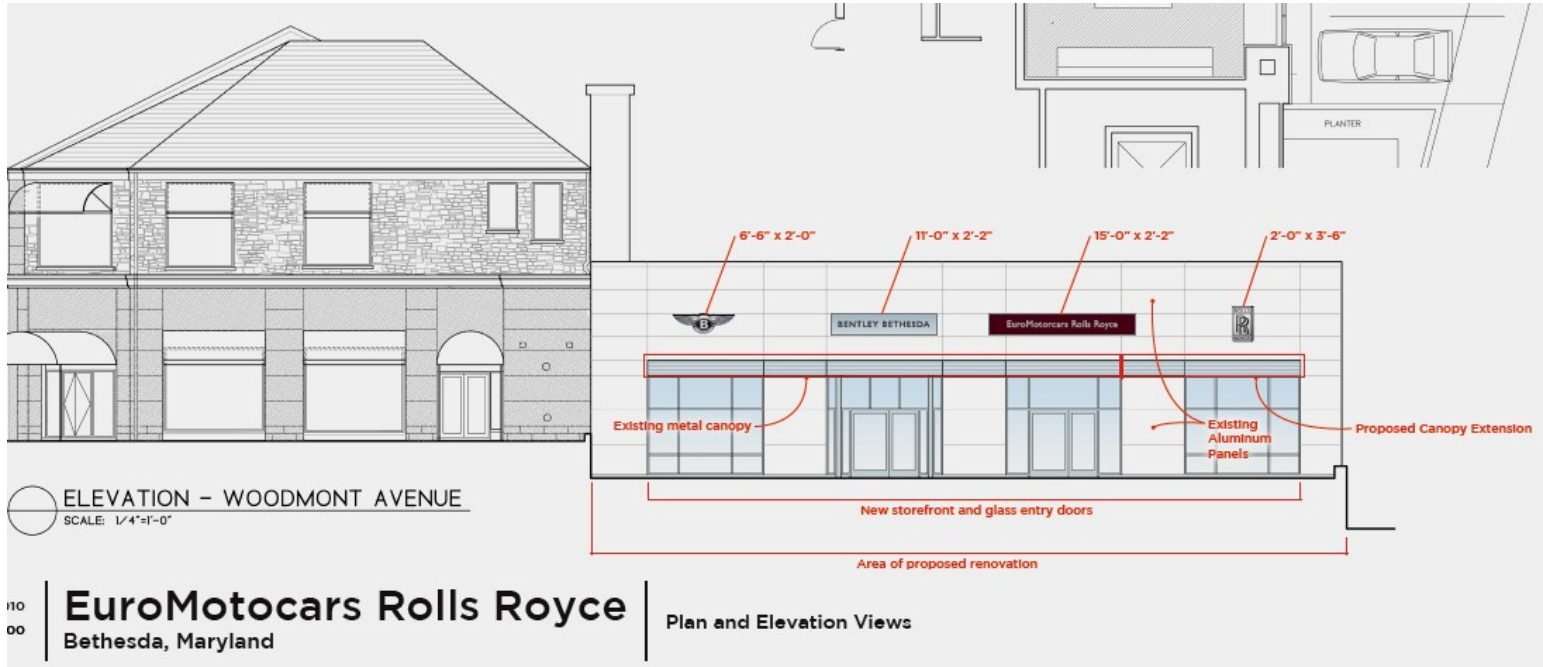
NOTES:

1. Development of the property occurred under previous zoning and therefore is grandfathered from current CBD-1 requirements.
2. Spaces provided in accordance with the Bethesda Parking Lot District Provisions.



Wisconsin Avenue

Woodmont Avenue



Technical Staff notes that the proposal requires only minor physical improvements to the existing commercial space (Exhibit 15, p. 8):

The proposal will not change the existing building footprint or the existing vehicular and pedestrian circulation around the property. The only proposed physical changes in the application are minor exterior alterations that include new doors that accommodate vehicles passing through, a new awning, and new signage.

3. Signage and Lighting:

The proposed new signage can be seen above the extended metal canopy on the above Woodmont Avenue elevation. Petitioner's architect, Jim Voelzke, testified (Tr. 26-33) that Petitioner is proposing brand specific signage for Bentley and for Rolls-Royce.

There are four signs proposed, which would occupy the same area where the previously existing sign was located. The previously existing sign was distinctly different from the sign that's being proposed in style and format, but the proposed signage is just slightly larger than what was existing. The previously existing sign formed about a 25 foot rectangle in that area. The new signs would spread out across the façade and would be internally illuminated. No other external lighting

is being proposed. In a post-hearing Exhibit (Exhibit 20), Petitioner's attorney indicated that sign variances would be required for the new signs, since four signs are proposed. The following condition is therefore recommended in Part V of this report:

No sign may be posted unless and until Petitioner obtains a permit therefor and a sign variance, if required, and copies of these documents are filed with the Board of Appeals.

4. Impacts on the Neighborhood, Public Facilities and the Environment:

According to Mr. DiPiazza, the operation of Petitioner's facilities from this location will actually be better than at the current locations. The current locations are more congested. There are a lot of restaurants and very small store fronts. At the new location, there are a service station and a parking lot across the street. So it is a less intensively used area. In his opinion, the proposed use will be in harmony with the general character of the neighborhood and would not be detrimental to the use, peaceful enjoyment, or development of the surrounding properties or general neighborhood.

Petitioner's expert witnesses (Jim Voelzke, an architect; James Hendricks, a civil engineer; and Edward Papazian, a transportation planner) all testified that the special exception would be compatible with the area and would have no adverse effects. Mr. Hendricks noted that there are also adequate public facilities in place to serve the use, and that the proposed project is exempt from forest conservation and storm water management regulations because it will not involve the construction of any new residential and commercial development, and the disturbed area will be less than 5,000 square feet. Tr. 34-38. Technical Staff agreed. Exhibit 15, pp. 13 and 19.

5. Traffic and Parking:

Mr. Papazian prepared a traffic impact statement for the proposed automobile sales facility. Exhibit 8. Mr. Papazian testified (Tr. 38-44) that he did a trip generation calculation in several ways. He looked at the 8,023 square feet and applied the typical retail trip generation rates applicable to the Bethesda Central Business District, as called for in the Planning Board's Local Area

Transportation Review (LATR) and Policy Area Transportation Review (PAMR) Guidelines. On that basis, he calculated that if this facility or a retail facility were opened during the morning peak hours, that would generate five trips in the morning peak hour, and in the p.m. peak hour, it would generate 21 trips, as a retail facility, applying the retail trip generation rates.

Mr. Papazian also looked at trip generation based upon the stated activity levels at this sales facility. The indication was that there would be anywhere from seven to 10 employees. If there were up to 10 employees at the facility, with the estimate of about five customers per day, and if all of that activity were to happen during the peak hour, which is unlikely, that would generate up to only 15 peak hour trips.

Either way, the calculation is such that the automobile sales facility would generate well under 30 peak hour trips. As a result, that would not require a traffic impact study. Based upon the guidance provided in the LATR and PAMR Guidelines, there would be no measurable impact on traffic in the area.

Furthermore, in terms of the PAMR test, utilizing the cited trip generation figures, and comparing that to typical suburban trip generation rates for retail, this facility would generate significantly fewer trips than a suburban retail facility. As a result of that, the policy area mobility review requirements, for partial mitigation, would be more than satisfied.

Mr. Papazian concluded that this automobile sales facility would have no adverse impact on traffic in the area. Technical Staff agreed with his conclusion, as noted in the Technical Staff report (Exhibit 15, pp. 12-13).

Mr. Papazian opined that the proposed special exception will not have any detrimental effect on vehicular or pedestrian traffic or safety since there will be no changes to the vehicular or pedestrian circulation in and around the site.

Technical Staff reports that the proposed use will require 45 parking spaces. Staff notes

(Exhibit 15, p. 13), that

. . . only 16 spaces are provided (eight along Wisconsin Avenue and eight along Woodmont Avenue) for the entire shopping center. However, the parking requirement for the proposal will be satisfied by the applicant paying a tax in accordance with the Bethesda Parking Lot District.

Although Petitioner agreed, in general, to the conditions proposed by Technical Staff, Petitioner's attorney suggested that since Petitioner is merely a lessee, it is the property owner who should be required to participate in the Bethesda Parking Lot District. Tr. 15. Since it is the Petitioner which is the party before the Board, the Hearing Examiner recommended rephrasing the conditions as follows:

Petitioner must ensure that parking for the use is accommodated by participation in the Bethesda Parking Lot District, although the actual payments for such participation may be made by Petitioner or the property owner.

In any event, Mr. Papazian observed that the proposed use would generate less demand for parking than other retail establishments occupying that space, given the relatively low amount of activity that was reported in the statement of operations.

C. The Master Plan

Petitioner's property is subject to the Bethesda Central Business District Sector Plan, approved and adopted in 1994. Technical Staff provides a very thorough evaluation of Sector Plan Compliance on pages 10 -12 of its report. As noted therein, the subject site lies within the area described in the Sector Plan as the "Wisconsin South Corridor," which is depicted on pages 56 and 125-126 of the Plan and discussed on pages 123-127.

The objectives and recommendations for the Wisconsin South Corridor are set forth on page 124 of the sector Plan:

OBJECTIVES:

1. Support a diverse specialty - and community-serving retail environment(s), including adequate short-term parking facilities.

2. Provide additional housing to encourage uses that are compatible with nearby residential areas

RECOMMENDATIONS:

The Plan recommends conformation of the existing CBD-1 Zone [for the site] . . .
Ground floor retail should be provided on such projects. . . .

The future land use plan on page 125 designates the site for “Retail and Service” use.

The proposed use will provide ground level retail on the site, as called for in the Sector Plan, and is allowed as a special exception under the CBD-1 zone. Zoning Ordinance §59-C-6.22(d).

Technical Staff also notes that the proposed use would comply with the Sector Plan’s General Urban Design Objectives (Section 3.2, pages 36-49) and the Streetscape Plan section (Chapter 6, Sections 6.1-6.4, pages 187-201). As stated by Staff (Exhibit 15, pp. 10-12):

The proposed use will add visual diversity and added street activity to the Woodmont Avenue intersection area west of Wisconsin Avenue. Retention of the existing retail building without changes to the Wisconsin Avenue frontage will result in compatibility with the other uses in the area.

* * *

These provisions are satisfied with the use as proposed at the Woodmont frontage of the existing retail building. The pedestrian character and scale of the area are maintained, and diversity of commercial use is provided.

* * *

The proposed use will contribute to an active and diverse pedestrian environment. . . .

Staff noted, however (Exhibit 15, p. 10),

Since the building was constructed prior to CBD-1 zoning, there is little open space associated with the existing building. Any future redevelopment of the site should include upgraded urban streetscape elements consistent with the Wisconsin Avenue South Corridor District

Technical Staff recommended a condition to this effect, and the Hearing Examiner has included that recommended condition in Part V of this report.

In sum, the proposed use is consistent with the Bethesda Central Business District Sector Plan.

D. Neighborhood Reaction

As noted in the first section of this report, there has been no opposition in this case, and indeed, no response whatever from the community. Technical Staff also reports, Exhibit 15, p. 13:

To date, staff has not received any correspondence on the application. There is no evidence of concern or objection from adjoining and confronting neighbors regarding the proposed indoor/outdoor automobile sales use.

III. SUMMARY OF HEARING

A public hearing was convened as scheduled on November 2, 2010. Petitioner called four witnesses: Paul J. DiPiazza, President of Euro Motorcars; Jim Voelzke, an architect; James Hendricks, a civil engineer; and Edward Papazian, a transportation planner. There were no other witnesses.

At the beginning of the hearing, the Hearing Examiner recited five questions that he asked Petitioner to address (Tr. 5-6):

1. What's the difference between an automobile sales and service center, as mentioned in 59-G-1.24, and the indoor/outdoor automobile sales mentioned in 59-C-6.2?
2. If there is a distinction, is your proposed operation closer to one than the other, and how so?
3. If it is actually closer to being an automobile sales and service center, then is that type of operation permitted at all in the CBD-1 zone?
4. If neighborhood need must be established, how does your proposal to remove two existing facilities and combine their function into one establish a need? Aren't you just creating a need by removing the existing facilities? (In most cases when there is a need requirement, there is an expert to establish that need by some market analysis.)
5. What kind of special exceptions do you presently have in the two facilities that you're seeking to combine into one?

The Hearing Examiner also introduced Technical Staff's response to the first four questions (Exhibit 17), and subsequently left the record open to allow Petitioner to respond to the last question.

Petitioner's counsel Erin Girard, Esquire, stated (Tr. 9-10) that no redevelopment of the property is proposed. The existing improvements will remain the same. Only the leasable area is going to become an indoor automobile sales business, which requires the special exception.

Ms. Girard noted that there is a distinction between "automobile sales and service" and

“indoor/outdoor automobile sales” in the code. Neither has any specific requirements in 59-G-2. Neither is explicitly defined in §59-A-2.1, although “automobile sales retail showroom” and “automobile sales and service mall” are defined.

She indicated that this proposed special exception is essentially an indoor interior showroom for the sale of cars. There will be no sale of parts. There will be no service going on. It's primarily indoor. She argued that, with an “automobile sales and service” use, the service is an essential component of that use, which does not exist here. This is more properly characterized as indoor/outdoor automobile sales. There may be some display cars parked in the parking spaces out front, but primarily it's indoors, and all sales would occur inside. She indicated her agreement with Technical Staffer Orobona in his email that it's the not having the service component that distinguishes this use, and that no needs analysis is required because this use would be outside the definition of the needs analysis section. Tr. 9-11.

Ms. Girard noted that the leased space originally was actually a Ford dealership. It's a nonconforming use under 59-G-4.1. The new use will require some minor exterior changes to the facade, but no site improvements. Tr. 12-13.

Ms. Girard argued that the proposed use will have no non-inherent impacts on the adjacent area because it will be indoors, primarily during daytime hours, and there is no exterior lighting proposed. It will have nominal impacts. Tr. 14.

Ms. Girard further stated that Petitioner agrees to the conditions proposed by Technical Staff except for the condition indicating that the applicant must participate in the Bethesda Parking Lot District because Applicant is merely the lessee. She feels that more appropriate language would be that the applicant and/or owner must participate in the Bethesda Parking Lot District. Tr. 15.

During the hearing, Ms. Girard, stated that Petitioner adopted the findings, analysis and conclusions of the technical staff report as part of Petitioner's evidence in the case. Tr. 38.

A. Petitioner's Case**1. Paul J. DiPiazza (Tr. 19-26; 48-51):**

Paul J. DiPiazza testified that he is the President of Petitioner, Euro Motorcars. Petitioner is the contract lessee of the property for the intended use, half of which would be a Rolls-Royce showroom, and the other half a Bentley showroom.

Petitioner operates two retail locations on Bethesda Avenue in Bethesda. They are across the street from a large Mercedes-Benz dealership. The Rolls-Royce store is located at 4919 Bethesda Avenue. It consists of about a 2,500 square foot showroom and out front there are two parking spaces, which are often used for outdoor display. Just down the block, at 4937 Bethesda Avenue, Petitioner has a Bentley showroom, approximately the same size, about 2,500 square feet, similar amount of display space, maybe one more outdoor parking space there.

Petitioner operates those franchises in tandem, so they have a single general manager and a joint sales force that consists of about anywhere from seven to 10 people, depending on what the staffing levels are at any time, and they serve both customer groups. Petitioner is open Monday through Saturday, 10:00 a.m. to 6:00 p.m., and Sundays typically only by appointment. It's a very low volume kind of a business. Petitioner typically sells on average about 10 a month out of the combined locations. Thirty to forty percent of the cars will actually be picked up at those locations, but a lot of the sales are made nationally, and the cars never actually are delivered from the retail location. They're shipped from a vehicle service center.

Service takes place on Marinelli Road in Rockville, where Petitioner has a facility. New cars, as they come into Petitioner's inventory, are delivered at Marinelli. They go through a pre-delivery inspection, where they get ready to be delivered to the customers. That takes place on Marinelli Road. All customers who have service needs go to Marinelli. Petitioner has a service advisor there.

Operations are expected to remain the same at the new location. The minimum requirements now for Rolls-Royce showrooms have gone from about 2,500 square feet, to 4,000 square feet, so Petitioner needed to seek a relocation of the Rolls-Royce store. Mr. DiPiazza observed that there is a certain synergy in having the dealerships operating next to each other, because these customers are all the same kinds of people, and they like to look at both cars at the same time. In fact, the manufacturers like to have them in close proximity to each other. Petitioner therefore sought a location in Bethesda that could accommodate both. What is now a combined 5,000 square feet will be a combined just over 8,000 square feet at the new location.

There are about 32 Rolls-Royce dealers in the United States. There are about 40 Bentley dealers in the United States. Petitioner is the only Rolls/Bentley dealership in the Washington metropolitan area. The next closest would be in Philadelphia, and then to the south, in Richmond. Petitioner is the exclusive dealer in this region.

According to Mr. DiPiazza, the operation of Petitioner's facilities from this location will actually be better than at the current locations. The current locations are more congested. There's a lot of restaurants and very small store fronts. At the new location, across the street is a service station and a parking lot. So it's a less intensively used area. In his opinion, the proposed use will be in harmony with the general character of the neighborhood and would not be detrimental to the use, peaceful enjoyment, or development of the surrounding properties or general neighborhood.

If the Board grants the application, it is Petitioner's intention to operate the improvements in accordance with the plans and specifications submitted and with any conditions imposed by the Board.

Mr. DiPiazza further testified that Petitioner currently serves about 800 customers in the area. Although the service center operation is on Marinelli, the service center could not exist at all, but for the fact that Petitioner has a sales center in Bethesda. These two things are part of one franchise

agreement. Mr. DiPiazza further testified that Petitioner currently serves about 800 customers in the area.

Petitioner now operates from facilities that are substandard in the sense that they don't meet square footage requirements specified by Rolls-Royce. Petitioner's ability to expand at its present locations is confined by the size of the present facilities. In order to remain a dealer in good standing and receive all of the products and benefits associated with being a dealer, Petitioner must meet those requirements.

Rolls-Royce came in, did an audit of Petitioner's facility in the last month, and they indicated that they want the customers to be served from a different facility, a facility that's larger and has certain standards and fits and finishes that Petitioner's present facility can't have. Thus, a showroom at the new location, with the size to accommodate Rolls-Royce's specifications, is needed to serve the population in the general neighborhood. If Petitioner were to stay at the existing location, this need to have the updated showroom would go unmet.

2. Jim Voelzke (Tr. 26-33):

Jim Voelzke testified as an expert in architecture. He stated that very little or no alteration is actually required of the building footprint. There is no additional square footage proposed. There is no change to the area of the building. There's no change to the exterior of the building with the exception of the store fronts within the existing openings. They are being replaced and the doors are being increased so that the cars can get in and out of the building when need be. No exterior lighting is proposed. No changes to the exterior canopy are proposed. Petitioner is proposing brand specific signage for Bentley and for Rolls-Royce.

There are four signs proposed, which would occupy the same area where the existing sign was. The existing sign was distinctly different than the sign that's being proposed in style and format, but the proposed signage is "just a hair" more than what was existing. The existing sign

formed about a 25 foot rectangle in that area. This is spreading it out across the facade. These signs would be internally illuminated.

Mr. Voelzke further testified that, from an architectural standpoint, the proposed building alterations would not have any adverse impact or cause a nuisance because an element of the architecture is incompatible with the environment and character of the surrounding neighborhood. The existing building experience will remain exactly as it is today. The proposed modification will be in harmony with the general character of the surrounding neighborhood, considering design, scale and bulk of the proposed improvements. From an architectural standpoint, the proposed special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of surrounding properties, the general neighborhood or cause any adverse effect on health, safety, security, morals, or general welfare of the residents, workers, or visitors in the area. He is confident that this will be an enhancement to the neighborhood.

According to Mr. Voelzke, the proposed improvements will not cause any objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, and they will be architecturally compatible with the existing structure and other buildings in the surrounding neighborhood.

3. James Hendricks (Tr. 34-38):

James Hendricks testified as an expert in civil engineering. He described the subject site and indicated that the property is served by public utilities, including water and sanitary sewer. Police and fire services are already established for the site, and the property is within the Bethesda Parking Lot District.

Mr. Hendricks further testified that the proposed project is exempt from forest conservation and storm water management regulations because the project will not involve the construction of any new residential and commercial development, and the disturbed area will be less than 5,000 square

feet. In his opinion, the proposed improvements would not have any adverse impact on public facilities at this location.

Moreover, the proposed improvements would not have any adverse impact or cause a nuisance because of noise, type of activity, or any other element incompatible with the environment and character of the surrounding neighborhood. Nor would they cause any objectionable noise, vibration, fumes, odors, dust, illumination, glare, or physical activity. From an engineering perspective, the proposed special exception will be in harmony with the general character of the surrounding neighborhood considering population density, design, scale, bulk, intensity and character of activity, considering number of similar uses, and it will not be detrimental to the use, peaceful enjoyment, economic value, or development of surrounding properties in the general neighborhood.

Mr. Hendricks further testified, from an engineering perspective again, that the proposed special exception will not cause any adverse effect on health, safety, security, morals, or general welfare of the residents, visitors or workers in the area, and that the proposed special exception be served by adequate public facilities, including police and fire protection, water, sanitary sewer, storm drainage, and other public improvements.

4. Edward Papazian (Tr. 38-44):

Edward Papazian testified as an expert in transportation planning and traffic engineering. He prepared a traffic statement for the proposed automobile sales facility. Mr. Papazian indicated that he did a trip generation calculation in several ways. He looked at the 8,023 square feet and applied the typical retail trip generation rates applicable to the Bethesda Central Business District as called for in the Planning Board's LATR and PAMR Guidelines. On that basis, he calculated that if this facility or a retail facility were opened during the morning peak hours, that would generate five trips

in the morning peak hour, and in the p.m. peak hour it would generate 21 trips. That would be a retail facility, applying the retail trip generation rates.

Mr. Papazian also looked at trip generation based upon the stated activity levels at this sales facility. The indication was that there would be anywhere from seven to 10 employees. If there were up to 10 employees at the facility, with the estimate of about five customers per day, and if all of that activity were to happen during the peak hour, which is unlikely, that would generate up to only 15 peak hour trips.

Either way, the calculation is such that the automobile sales facility would generate well under 30 peak hour trips. As a result, that would not require a traffic impact study. Based upon the guidance provided in the LATR and PAMR Guidelines, there would be no measurable impact on traffic in the area.

Furthermore, in terms of the policy area mobility review test, the PAMR test, utilizing the cited trip generation figures, and comparing that to typical suburban trip generation rates for retail, this facility would generate significantly fewer trips than a suburban retail facility. As a result of that, the policy area mobility review requirements, for partial mitigation, would be more than satisfied.

Mr. Papazian concluded that this automobile sales facility would have no adverse impact on traffic in the area. The local area transportation review, the LATR requirements would be satisfied through the cited trip rate calculations, and the policy area mobility review, the PAMR requirements, would be satisfied through the use of the trip rates and comparing those trip figures to typical suburban rates. Technical Staff agreed with his conclusion, as noted in the technical staff report.

Mr. Papazian opined that the proposed development will be consistent with the general plan of the Bethesda CBD sector plan in terms of transportation planning and that the proposed development will be in harmony with the general character of the surrounding neighborhood

considering intensity and character of activity and traffic conditions. In his opinion, the proposed improvements will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties of the general neighborhood; nor would the proposed improvements cause any objectionable noise or physical activity. The proposed special exception will not have any detrimental effect on vehicular or pedestrian traffic or safety. No changes to the vehicular or pedestrian circulation in and around the site are proposed as part of this special exception. There would be no adverse impact, and the proposed modification be served by adequate transportation public facilities. From the standpoint of traffic, the proposed special exception and development are suitable for this site, and compatible with the surrounding neighborhood.

According to Mr. Papazian, there is some parking in front of the facility, and as indicated, there is public parking in the area (*i.e.*, The applicant is going to be part of the parking lot district.). This proposed use would produce or generate less demand for parking than other retail establishment occupying that space, given the relatively low amount of activity that was cited in the statement of operations. This proposed use would not create any danger to pedestrian or vehicular traffic.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others.

The zoning statute usually establishes both general and specific standards for special exceptions, and applicants ordinarily have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. In this case, however, there are no specific standards spelled out in the Zoning Ordinance for this special exception, “Automobile sales, indoors and

outdoors,” the special exception listed in Zoning Ordinance §59-C-6.22(d). Thus, Petitioner’s burden is to show that the proposed use satisfies all applicable general standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if it complies with the conditions Staff recommended. Exhibit 15, p.1.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with the proposed “automobile sales, indoors and outdoors.” Characteristics of the proposed “automobile sales, indoors and outdoors” use that are consistent with the “necessarily associated” characteristics of “automobile sales, indoors and

outdoors” will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with “automobile sales, indoors and outdoors,” or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

The following are inherent characteristics of “automobile sales, indoors and outdoors,” as spelled out by Technical Staff (Exhibit 15, p. 15):

- (1) the physical presence of buildings, cars, and parking facilities;
- (2) lighting associated with the building; and
- (3) physical activity and traffic associated with employees and patrons traveling to and from the site.

The Hearing Examiner agrees with this listing of inherent characteristics of this use.

Technical Staff found no unusual site conditions or non-inherent effects, and stated (Exhibit 15, pp. 15-16):

In the instant case, there are no adverse effects that will negatively impact the community above and beyond those necessarily inherent to the indoor/outdoor automobile sales use. The applicant is proposing to display 15 show-automobiles, with ten of the 15 being located indoors. Displaying five vehicles outdoors is fewer than the typical automobile dealership. The parking area along Woodmont Avenue outside the dealership has space for only eight cars, but adequate parking will be available since the site is located within the Bethesda Parking Lot district. The smaller parking area, along with the dealership having only ten employees and expecting an average of only five customers per day, will restrict the amount of physical activity occurring inside and outside the dealership. No additional lighting is proposed with the application. Lastly, no car-carriers will deliver automobiles to the site.

The operational and physical characteristics of the proposed automobile sales use are consistent with the inherent characteristics of an automobile sales use. There are no non-inherent adverse effects present in this case.

The Hearing Examiner agrees with Staff. Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes that there are no non-inherent adverse effects demonstrated by this record.

B. General Conditions

The general standards for a special exception are found in Zoning Ordinance §59-G-1.21(a). The Technical Staff report, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: The proposed “automobile sales, indoors and outdoors” use is a permissible special exception in the CBD-1 Zone, pursuant to Zoning Ordinance §59-C-6.22(d), for sites developed under the standard method of development.⁴

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: There are no specific standards spelled out in *Division 59-G-2* the Zoning Ordinance for this special exception..

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board’s technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant

⁴ Zoning Ordinance §59-C-6.22(d) permits the use as a matter of right in the CBD-1 Zone for sites developed under the optional method of development.

the special exception must include specific findings as to master plan consistency.

Conclusion: Petitioner's property is subject to the Bethesda Central Business District Sector Plan, approved and adopted in 1994. For the reasons set forth in Part II. C. of this report, the Hearing Examiner finds that the planned use, the proposed "automobile sales, indoors and outdoors," is not inconsistent with the goals and objectives of the Sector Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: Technical Staff concluded that the proposed use will be in harmony with the general character of the surrounding residential neighborhood. As stated by Staff (Exhibit 15, p. 17):

The proposal will be in harmony with the general character of the neighborhood. Only minor improvements will occur to the existing property, with no change to the building's overall footprint, scale, or height. There will be no impact on population density. The proposal will result in only a modest increase in the intensity of the property with no change to the commercial character of the existing building. A decrease in vehicular traffic will occur considering the typical retail venture that could operate at this location. Provisions of the Bethesda Parking Lot District will be met to satisfy parking requirements. No other automobile dealerships exist within the South Wisconsin Corridor of the downtown Bethesda neighborhood.

The Hearing Examiner agrees and so finds. Moreover, as found by Staff, "The proposed special exception will be adequately served by existing public services and facilities." Exhibit 15, p. 19.

- (5) *Will not be detrimental to the use, peaceful enjoyment,*

economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: Technical Staff found the proposed “automobile sales, indoors and outdoors” use will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood because the proposal presents only minimal impacts to the immediate area. The Hearing Examiner agrees for the reasons stated in response to the previous provision, and so finds.

(6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There is no evidence that the special exception would cause objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. As noted by Technical Staff, the majority of activity associated with the proposal will occur indoors during daytime hours, so no objectionable impact from noise or physical activity will occur on neighboring properties. Moreover, no exterior illumination is proposed beyond that already existing on the premises. Due to the nature of the use, no vibrations, fumes, odors, or dust will be generated on-site.

Exhibit 15, p. 18.

(7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff reports that “The majority of properties in the neighborhood are zoned mixed use or commercial. Therefore, the proposal will not alter the existing nature of the area.” Exhibit 15, p. 18. Moreover, the proposed use is consistent with the Sector Plan recommendations, and per this section, “*Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*”

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. Exhibit 15, p. 18 and Tr. 34-38.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff reports that “The proposed special exception will be adequately served by existing public services and facilities. Police and fire services, water, and sanitary sewer are already established for the site . . . and the established public road network is capable of handling modest increases.” Exhibit 15, p. 19.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: Technical Staff indicates that “Neither subdivision nor site plan review will be required should the Board of Appeals approve the special exception request..” Exhibit 15, p. 2. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). As indicated in Part II. B. of this report, Petitioner’s transportation planner and Technical Staff did do such a review, and Staff concluded (Exhibit 15, pp. 12-13):

The proposal satisfies the Local Area Transportation Review (LATR) and the Policy Area Mobility Review (PAMR) tests and will have no adverse impact on area roadways or nearby pedestrian facilities. A traffic study was not required to satisfy the LATR test because the proposed use generates fewer than 30 total peak-hour trips within the weekday morning and evening peak periods. In fact, the proposal will likely generate less vehicle trips than a typical retail use at this location as fewer customers will visit a Bentley/Rolls-Royce dealership than a general commercial venture. The application satisfies PAMR simply by being located in the Bethesda CBD Policy area.

Therefore, the Hearing Examiner finds that the instant petition meets all the applicable Growth Policy standards.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Technical Staff’s conclusion that “[t]he proposal will not negatively impact the safety of vehicular or pedestrian traffic . . . ,” the Hearing Examiner so finds. Exhibit 15, p. 19.

C. Specific Standards

There are no specific standards spelled out in the Zoning Ordinance for this special exception.

D. General Development Standards §59-G-1.23

- (a) **Development Standards.** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: In addition to the other general standards set forth above, “*Special exceptions are subject [under Code § 59-G-1.23(a)] to the development standards of the applicable zone where the special exception is located [in this case, the CBD-1 Zone in which the subject site is located] except when the standard is specified in Section G-1.23 or in Section G-2.*”

The following table was provided by Technical Staff demonstrating compliance with applicable development standards (Exhibit 15, p. 14).

Development Standard	Min/Max Required	Provided	Applicable Zoning Provision
Minimum Lot Area	n/a	41,436 sq ft (0.95 acres)	§59-C-6.231
Maximum Building Coverage	75 percent	65 percent	§59-C-6.232
Minimum Public Use Space	10 percent	0.06 percent ⁵	§59-C-6.233
Maximum Density	1.0 FAR	0.89 FAR	§59-C-6.234(a)(ii)
Maximum Building Height	60 feet	28 feet	§59-C-6.235(a)
Setback from ROW	0 feet	16 feet	§59-C-6.236(b)(2)
Setback from Adjoining Residential Lot (south side)	10 feet (R-10 Zone requirement)	20 feet	§59-C-6.236(d)(1)
Required Parking Spaces	45 Spaces (8,023 sq ft @ 5 spaces/1,000 sq ft)	16 Spaces ⁶	§59-E-3.7
Parking Facility Setback from Adjoining Residential Zone (south side)	10 feet (R-10 Zone requirement)	20 feet	§59-E-2.81(b)(2)

⁵ The development on-site predates CBD zoning and is a nonconforming use subject to the provisions of §59-G-4.1.

⁶ The applicant will satisfy the parking requirement in accordance with the Bethesda Parking Lot District.

- (b) **Parking requirements.** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: The parking requirements for this proposal were discussed in Part II. B. 5 of this report. Based on the evidence discussed therein, the Hearing Examiner finds that Petitioner has complied with parking requirements.

- c) **Minimum frontage.** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

Conclusion: Not applicable.

- (d) **Forest conservation.** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Environmental issues are discussed in Part II. B. 4 of this report. As noted therein, the proposed project is exempt from forest conservation and storm water management regulations because it will not involve the construction of any new residential and commercial development, and the disturbed area will be less than 5,000 square feet.

Tr. 34-38. Technical Staff agreed. Exhibit 15, pp. 13 and 19.

- (e) **Water quality plan.** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the*

department find that the required revisions can be evaluated as part of the final water quality plan review.

Conclusion: This section is inapplicable because the subject site is not within a special protection area, and therefore a water quality plan is not required. As discussed immediately above, storm water management regulations are inapplicable.

(f) Signs. *The display of a sign must comply with Article 59-F.*

Conclusion: As discussed in Part II. B. 3 of this report, there are four signs proposed, which would occupy the same area where the previously existing sign was located. The following condition is therefore recommended in Part V of this report:

No sign may be posted unless and until Petitioner obtains a permit therefor and a sign variance, if required, and copies of these documents are filed with the Board of Appeals.

(g) Building compatibility in residential zones.

Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.

Conclusion: The site is not in a residential zone and the structure is not being substantially altered.

h. Lighting in residential zones

All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

- (1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Inapplicable. The site is not in a residential zone.

E. Neighborhood Need

Zoning Ordinance §59-G-1.24 requires that a prerequisite to obtaining certain specified special exceptions is a showing of “neighborhood need.” The provision is quoted, in full, below:

59-G-1.24. Neighborhood need.

In addition to the findings and requirements of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:

- (1) Automobile filling station.*
- (2) Automobile and light trailer rental lot, outdoor.*
- (3) Automobile, truck and trailer rental lot, outdoor.*
- (4) Automobile sales and service center.*
- (5) Swimming pool, community.*
- (6) Swimming pool, commercial.*

A threshold question in this case is whether this provision applies to this particular special exception. The provision lists “(4) *Automobile sales and service center*” as one type of special exception that requires such a showing. No other special exception listed even arguably applies.

Petitioner in the subject case argues that the special exception sought in this case is not one for an *Automobile sales and service center* because that is not the name of the special exception specified in the applicable section of the Zoning Ordinance. That section, Zoning Ordinance §59-C-6.22(d), specifies that an “Automobile sales, indoors and outdoors” use is permitted in the CBD-1 Zone by special exception. It does not mention a “service center” for automobiles, and there is no service center associated with the special exception proposed in this case at this site; it will be strictly a sales operation at the special exception site location.

Petitioner’s counsel, Erin Girard, Esquire, indicated that this proposed special exception is essentially an indoor interior showroom for the sale of cars. There will be no sale of parts and no service of automobiles provided on site. This use is more properly characterized as indoor/outdoor automobile sales. There may be some display cars parked in the parking spaces out front, but

primarily it will be an indoor operation, and all sales would occur inside. She argued that, with an “automobile sales and service” use, the service is an essential component of that use, which does not exist here. Based on this distinction, Petitioner contends that no needs analysis is required because this use would be outside the definition of the needs analysis section. Tr. 9-11.

In an e-mail to the Hearing Examiner on the morning of the hearing (Exhibit 17), Technical Staff agreed with Petitioner, making the following observations in response to the Hearing Examiner’s questions to the Petitioner, which are in the record as Exhibit 16:

Question 1: What is the difference between an automobile sales and service center, as mentioned in 59-G-1.24, and the indoor/outdoor automobile sales mentioned in 59-C-6.2?

Staff Answer: It is impossible to know the exact distinction the code attempts to draw between the two listed uses, as neither is defined, but the fact that the code does draw a distinction cannot be ignored. “Indoor/Outdoor Automobile Sales” is clearly a use allowed by special exception (under standard method) in the CBD-1 Zone under §59-C-6.2. It is also visibly distinct from the “Automobile sales and service center” use listed under the needs provision of §59-G-1.24. By way of example, both uses (albeit with slightly differing terminology again) are listed separately under the industrial land use table under §59-C-5.2, and the uses are not permitted identically across the board (see footnote 8 in the industrial land use table). Given this fact, it seems logical that the code did intend to draw a distinction between the two uses. Using a plain language reading, the indoor/outdoor auto sales use is different from the auto sales and service use because no service component is provided with the former.

Question 2: If there is a distinction, is your proposed operation closer to one than the other, and how so?

Staff Answer: The proposed operation is closer to the indoor/outdoor auto sales use as there is no service component proposed with the application. Only the sales of automobiles will take place with showcars located both inside and outside the building.

Question 3: If it is actually closer to being an automobile sales and service center, then is that type of operation permitted at all in the CBD-1 zone?

Staff Answer: n/a

Question 4: If neighborhood need must be established, how does your proposal to remove two existing facilities and combine their function into one establish a need? Aren't you just creating a need by removing the existing facilities? (In most cases, when there is a need requirement, there is an expert to establish that need by some market analysis.)

Staff Answer: Using the analysis above, [a showing of] neighborhood need would not be necessary.

Whether the Council meant to create the distinction observed by Technical Staff and Petitioner's counsel is a question of statutory construction. The applicable rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006),

Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist. If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent. [Citations omitted.]

In this case, one could argue that there is no ambiguity, since one term includes a reference to "service center," and one does not. On the other hand, it is also arguable that there is ambiguity in the Council's language, since the terms "*Automobile sales and service center*" and "*Automobile sales, indoors and outdoors*" are not defined in the Zoning Ordinance.

Unfortunately, even if we did look behind the statutory language, to the legislative history of Zoning Ordinance §59-G-1.24, it does not yield a clear-cut answer. A form of that provision, including "(4) *Automobile sales and service centers*," was added to the Code by Ordinance 6-137, enacted on January 14, 1969. The Opinion accompanying that enactment, while not addressing the "service center" question directly, does suggest that this provision was aimed at reducing the impact on the community from the specified special exceptions. As stated on page one of that opinion, it was the intent of the Council, by this amendment, "to strengthen the restrictions surrounding the granting of special exceptions for protection of the residents of the County."

It is reasonable to conclude that an automobile sales center, without an automobile service center component, would be less disruptive to the immediate neighborhood, and therefore not warranting a showing of need to justify its imposition upon the community. That is the conclusion that the Hearing Examiner reaches, and he therefore finds that the Council did intend to distinguish

between the two special exceptions, an “*Automobile sales and service center*” and “*Automobile sales, indoors and outdoors.*”

Given that conclusion, the Hearing Examiner also concludes that Zoning Ordinance §59-G-1.24 does not apply to the special exception sought here and that Petitioner is not required to make a showing of neighborhood need.

Nevertheless, at the invitation of the Hearing Examiner, Petitioner did present some evidence bearing on the question of neighborhood need. Petitioner’s president, Paul J. DiPiazza, testified (Tr. 19-26; 48-51) that there are about 32 Rolls-Royce dealers in the United States, and about 40 Bentley dealers. Petitioner is the only one in the Washington metropolitan area. The next closest would be in Philadelphia, and then to the south, in Richmond.

According to Mr. DiPiazza, Rolls-Royce did an audit of Petitioner’s facility in the last month, and they indicated that they want the sales customers to be served from a different facility, a facility that is larger and has certain standards and fits and finishes that Petitioner’s present facility can’t have. Thus, a showroom at the new location, with the size to accommodate Rolls-Royce’s specifications, is needed to serve the population in the general neighborhood. If Petitioner were to stay at the existing location, this need to have the updated showroom would go unmet.

Mr. DiPiazza further testified that Petitioner currently serves about 800 customers in the area. Although the service center operation is on Marinelli Road in Rockville, the service center could not exist at all, but for the fact that Petitioner has a sales center in Bethesda. These two things are part of one franchise agreement. Petitioner now operates from facilities that are substandard in the sense that they do not meet Rolls-Royce’s square footage requirements. Petitioner’s ability to expand at its present locations is confined by the size of the present facilities. In order to remain a dealer in good standing and receive all of the products and benefits associated with being a dealer, Petitioner must meet Rolls-Royce’s requirements.

The Hearing Examiner questions whether such evidence would be sufficient to establish neighborhood need, because the facility already exists, and Petitioner is merely proposing to move it to a nearby neighborhood and expand it. In most cases, when there is a need requirement, an expert is called to establish that need by some market analysis. That was not done in this case. The evidence established a need to expand, but not necessarily a neighborhood need in the proposed new neighborhood.

In any event, this issue need not be decided because the record supports the conclusion that no showing of neighborhood need is required in this case. All other required showings have been made.

In sum, it is clear from the record that the proposed use will create no non-inherent adverse impacts and will meet all applicable special exception regulations. The Hearing Examiner therefore recommends that the Board of Appeals grant the petition, with the conditions suggested in the final section of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2774 for a special exception to permit an “automobile sales, indoors and outdoors” use within an existing shopping center at 7008 Wisconsin Avenue, Bethesda, Maryland, be GRANTED, with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. The number of employees on site at any given time must not exceed ten (10).
3. Outdoor automobile displays must be limited to five (5) automobiles.
4. Floor area for the use is limited to 8,023 square feet.
5. Petitioner must not provide automobile repair services on site.

6. Petitioner must ensure that parking for the use is accommodated by participation in the Bethesda Parking Lot District, although the actual payments for such participation may be made by Petitioner or the property owner.
7. In the event that there are any future structural additions or a demolition of the existing improvements and reconstruction, conformance with the Bethesda streetscape requirements and other requirements for new development in the Bethesda CBD must be followed.
8. No sign may be posted unless and until Petitioner obtains a permit therefor and a sign variance, if required, and copies of these documents are filed with the Board of Appeals.
9. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: December 8, 2010

Respectfully submitted,

Martin L. Grossman
Hearing Examiner